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Supreme Court of the United States

OCTOBER TERM, 1966

No. 483

NEIL REITMAN, ET AL.,

Petitioners,

vs.

LINCOLN W. MULKEY, ET AL.,

Respondents.

BRIEF OF THE ATTORNEY GENERAL OF THE STATE OF NEW YORK AS *AMICUS CURIAE* IN SUPPORT OF AFFIRMANCE

LOUIS J. LEFKOWITZ
Attorney General of the State of New York

SAMUEL A. HIRSHOWITZ
First Assistant Attorney General

GEORGE D. ZUCKERMAN
LAWRENCE J. GROSS
Assistant Attorneys General
of Counsel

249 Press of Fremont Payne, Inc., 80 Washington St., N. Y.—BOwling Green 9-8153

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BRIEF OF THE ATTORNEY GENERAL OF THE STATE OF NEW YORK AS *AMICUS CURIAE* IN SUPPORT OF AFFIRMANCE

Interest of the *Amicus*

The State of New York has been a pioneer in the enactment of fair housing legislation. New York banned discrimination in public housing in 1939,[1] in urban renewal housing in 1950,[2] and in publicly-assisted housing accommodations in 1955.[3] By statutes enacted in 1961 and 1963,

[1] N. Y. Laws, 1939, Ch. 808, § 223, now found in Public Housing Law § 223.

[2] N. Y. Laws, 1950, Ch. 287, now found in Civil Rights Law, Art. 2-A.

[3] N. Y. Laws, 1955, Ch. 341, now found in Civil Rights Law, Art. 2-A; Laws, 1955, Ch. 340, now found in Executive Law § 296, subd. 3.

New York prohibited discrimination in all housing accommodations, private as well as public, with the exception of the rental by the owner of a unit in a two-family house in which the owner or members of his family reside or the rental by an occupant or an owner of a room or rooms in a housing accommodation in which they or members of their family reside.[4]

New York's sister state of California has also taken great strides in recent years in the enactment of legislation to combat discriminatory practices in the sale or rental of housing accommodations.[5] However, California's progress in seeking to provide all citizens with the opportunity to acquire adequate housing was abruptly halted in 1964 by the adoption of Proposition 14 by the California electorate, after a vigorous campaign sponsored by the California Real Estate Association and the California Apartment Owners Association. Proposition 14, which was incorporated into the California Constitution as Article I, § 26, not only has the effect of repealing existing state and local fair housing laws in California, but purports to create a right for any person or corporation to discriminate with "absolute discretion" in the sale or rental of residential property, regardless of the size or scope of the housing accommodation, and "irrespective of how obtained or financed."

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[4] N. Y. Laws, 1961, Ch. 414, as amended by Laws, 1963, Ch. 481, now found in Executive Law § 296, subd. 5.

[5] In 1959, the "Unruh Act" (Cal. Civil Code §§ 51-52) prohibited discrimination by any "business establishment", which was interpreted to encompass all businesses selling or leasing residential housing. See *Burks* v. *Poppy Const. Co.*, 57 Cal. 2d 463, 370 P. 2d 313 (1962). That same year the "Hawkins Act" (formerly Cal. Health & Safety Code §§ 35700-35741) prohibited racial and religious discrimination in publicly-assisted housing accommodations. In 1963, the "Rumford Act" (Cal. Health & Safety Code §§ 35700, et seq.) extended the prohibition against discriminatory practices to private dwellings containing more than four units.

The State of New York views the outcome of this litigation involving the constitutionality of Article I, § 26 of the California Constitution with more than academic interest. We are concerned with the effect that the operation of this section would have on the right of our citizens, who may be members of a minority race or religion, to freely travel to the State of California since we recognize that the constitutional right to travel to other states would be meaningless if our citizens could not obtain adequate housing accommodations at the end of their journey. But of far greater concern is the effect that this litigation may have on the future of fair housing laws throughout the country. It is naive to believe that the recent experience in California, where Proposition 14 was adopted by the electorate despite the active opposition of leaders of both major political parties as well as the leaders of every major religion in the State, could not be repeated in other states. Opponents of anti-discrimination legislation are certain to be encouraged to mount similar campaigns in the wake of their success in California. The rights of members of minorities to secure adequate housing accommodations as well as to obtain equal opportunities for employment and access to public accommodations might well rest on the outcome of this litigation. The time has now arisen in which the public must learn whether the basic needs of citizens in any state may constitutionally be subordinated to the desires of an unconcerned, intolerant majority.

The State of New York, accordingly, files this brief as *amicus curiae* pursuant to Rule 42 of the Revised Rules of this Court.

Questions Presented

1. Does Article I, § 26 of the California Constitution, which purports to create a constitutional right to discriminate in the sale or rental of interests in real property,

irrespective of the scope of the housing accommodation or the manner in which such property was obtained or financed, violate the Fourteenth Amendment of the United States Constitution?

2. Does Article I, § 26 of the California Constitution abridge Federal rights afforded by § 1982 of Title 42 of the United States Code?

Constitutional Provision Involved

Proposition 14, as now incorporated into the California Constitution as Article I, § 26, provides:

> "Neither the State nor any subdivision or agency thereof shall deny, limit or abridge, directly or indirectly, the right of any person, who is willing or desires to sell, lease or rent any part or all of his real property, to decline to sell, lease or rent such property to such person or persons as he, in his absolute discretion, chooses.
>
> 'Person' includes individuals, partnerships, corporations and other legal entities and their agents or representatives but does not include the State or any subdivision thereof with respect to the sale, lease or rental of property owned by it.
>
> 'Real property' consists of any interest in real property of any kind or quality, present or future, irrespective of how obtained or financed, which is used, designed, constructed, zoned or otherwise devoted to or limited for residential purposes whether as a single family dwelling or as a dwelling for two or more persons or families living together or independently of each other.
>
> This Article shall not apply to the obtaining of property by eminent domain pursuant to Article I, Sections 14 and 14½ of this Constitution, nor to the renting or

providing of any accommodations for lodging purpose by a hotel, motel or other similar public place engaged in furnishing lodging to transient guests.

If any part or provision of this Article, or the application thereof to any person or circumstance, is held invalid, the remainder of the Article, including the application of such part or provision to other persons or circumstances, shall not be affected thereby and shall continue in force and effect. To this end the provisions of this Article are severable."

POINT I

Article I, § 26 of the California Constitution violates the Equal Protection Clause of the Fourteenth Amendment.

In considering the constitutionality of Article I, § 26 of the California Constitution, it should be recognized at the outset that this section does more than render inoperative existing fair housing laws and ordinances within the state. If the amendment at issue had as its sole purpose the repeal of certain legislation, it would have been simple enough to limit its language to achieve that result. Instead, it is clear from a reading of § 26 that the object of the Amendment was, as described by the Supreme Court of California in its decision below, to create "a purported constitutional right to privately discriminate on grounds which admittedly would be unavailable under the Fourteenth Amendment *should state action be involved*". (R. 20).

This attempt to evade the prohibitions of the Fourteenth Amendment must be deemed to have failed in at least two vital respects. First, the effect of Section 26, the attendant circumstances surrounding its enactment, and the history of state involvement in housing discrimination, reveal that its adoption cannot be considered as an act of neu-

trality by the state as petitioners suggest, but rather constitutes a state attempt to sanction and perpetuate racial discrimination. Second, the application of the right created by § 26 would apply to housing developments and involve situations in which state action necessarily would be involved in violation of the prohibitions of the Fourteenth Amendment.

A. Article I, § 26 is not a declaration of state neutrality, but rather constitutes a state effort to sanction and perpetuate racial discrimination in the sale and rental of housing accommodations.

As is often the case in examining the effect of state legislation in the light of a constitutional challenge under the Fourteenth Amendment, it is necessary to consider first the historical background and attendant circumstances concerning the act in issue. *Griffin* v. *County School Board,* 377 U. S. 218, 231 (1964); *Gomillion* v. *Lightfoot,* 364 U. S. 339 (1960). Here, the right of private discrimination set forth in § 26 must be construed in light of the existing patterns of housing segregation in California and the difficulties that have been encountered by members of minorities in seeking adequate housing accommodations. Such an examination will reveal that only in a historical vacuum can Article 1, § 26 be considered as an act of neutrality by the State of California.

1. The existence of discrimination in the sale and rental of housing accommodations in California.

In 1960, there were approximately 1.3 million non-whites residing in California, of which 883,000 were Negroes[6] who were concentrated principally in the major urban centers of the state.[7]

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[6] U. S. Bureau of Census, *General Population Characteristics,* California (PC (1)-6b), 1961.

[7] U. S. Commission on Civil Rights, 50 States Report, p. 43 (1961).

Approximately 80% of the Negroes living in California's metropolitan areas were found to reside in segregated neighborhoods.[8] Recent studies show that the patterns of segregation are increasing. For example, a 1966 survey by the Bureau of the Census reported that the percentage of Negroes in south Los Angeles has increased from 70% in 1960 to 81% in 1955—*Current Population Reports, Technical Studies,* P-23-17.

The substantial segregation of non-whites in California has been the product of discrimination in the sale and rental of housing. A *Report on Housing in California* issued by the Governor's Advisory Commission on Housing Problems in 1963 revealed that it was practically impossible for non-whites to buy new homes in southern California subdivisions, while in northern California fewer than 100 non-whites had been able to buy homes in unsegregated tracts in a period during which 350,000 new homes were built. The same report noted that "even in San Francisco a survey of recently constructed apartments showed that there were no Negroes in structures containing 97% of the new units and no Orientals in 78%" (Governor's Advisory Commission, *op. cit.,* p. 9).

Petitioners have claimed that the fact that non-whites are substantially less well-housed then whites is not due to discrimination and segregation, but due to the complex factors that make non-whites poorer than whites. Brief for Petitioners, pages 42-43. While there is an element of truth in that statement, it ignores the fact that even where non-whites have the income to purchase homes, they are

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[8] Karl & Alma Taeuber, *Negroes in Cities,* Aldiner (1965), p. 40. A segregation index based upon the the percent of Negroes who would have to move if they were to live at random in metropolitan areas was devised by the authors showing the following figures for major California cities: Los Angeles 81.8%, San Francisco 69.3%, San Diego 81.3%, Long Beach 84.0%, Riverside 83.5%, San Bernadino 84.0%, Bakersfield 87.5%, Fresno 83.9%, Oakland 73.1%

often deprived of the opportunity of doing so due to the erection of discriminatory barriers. Thus, in both Los Angeles and San Francisco, it was found that non-whites earning between $7,000 and $10,000 would probably buy more than twice as many homes priced at $15,000 or higher than they already own as a group if such housing were available to them. Housing and Home Finance Agency, *Potential Housing Demands of Non-White Population in Selected Metropolitan Areas, Table G* (1962). Moreover, since the supply of housing available to non-whites is limited as a result of discriminatory attitudes, the prices they must pay for housing accommodations are generally grossly inflated when compared to equivalent accommodations available to white citizens.

The inevitable result of discrimination in the sale or rental of housing accommodations is the creation of urban ghettos, with all its attendant disabilities. Many of these disabilities have been outlined in the President's 1967 Civil Rights Message to Congress, in the following terms:

> "The result of countless individual acts of discrimination is the spawning of urban ghettos, where housing is inferior, overcrowded and too often overpriced.
>
> Statistics tell a part of the story. Throughout the nation, almost twice as many non-whites as whites occupy deteriorating or dilapidated housing. In Watts, 32.5 per cent of all housing is overcrowded, compared with 11.5 per cent for the nation as a whole.
>
> The environment of most urban ghettos is the same: Inferior public facilities and services—streets, lighting, parks; sanitation and police protection; inferior schools; and isolation from job opportunities. In every sphere of urban life the ghetto-dweller is shortchanged.'"[9]

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[9] *New York Times*, February 16, 1967, p. 28.

Indeed, the California Legislature has itself recognized that "racial discrimination against persons of certain groups in seeking housing" is one of the principal causes of slum and blighted residential areas. See Cal. Community Redevelopment Law § 33039(c).

2. *Segregated housing conditions in California are in part the result of prior state action.*

The existence of racial segregation and housing in California must, in large part, be attributed to the effect of restrictive covenants and to the actions of real estate boards—which have in the past involved support by state and local governments.

The use of racial restrictive covenants limiting the sale or rental of interests in real property to non-caucasians has been prevalent in Los Angeles County since as early as 1902.[10] In 1920, the Supreme Court of California, in an action seeking enforcement of a restrictive covenant against a Negro purchaser, found that restrictions against use and occupancy by non-whites were valid and enforceable. *Los Angeles Investment Company* v. *Gary,* 181 Cal. 680 (1920). During the next three decades (until such covenants were held to be unenforceable by *Shelley* v. *Kraemer,* 334 U. S. 1 [1948]), with the assistance of the California courts, the use of restrictive covenants played a significant role in confining non-caucasians to certain urban areas.[11] By 1947, it was reported that Los Angeles was widely covered by these racial restrictive covenants and that new housing subdivisions were blanketed by them. President's Committee on Civil Rights, *To Secure These Rights,* 68 (1947).

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[10] Hearings before the United States Commission on Civil Rights, Los Angeles, San Francisco, January, 1960, pp. 256-257. (Hereafter referred to as Cal. Hearings.)

[11] Cal. Hearings, p. 257.

Although the State of California licenses all real estate brokers, it has been generally conceded that California real estate agents have been a powerful force in creating and perpetuating patterns of segregation within the State.[12] The California State Advisory Committee of the United States Commission on Civil Rights concluded in 1961 that a large measure of blame for the existence of discrimination in California must be placed on the real estate industry. The Committee stated that:

> "• • • So far as Committee testimony has been given, it would appear that a considerable number of leaders in the real estate industry still continue to support and advance the concepts of segregation in their business. Their actions, in large part, appear to foster continued discrimination in California. In such population centers as Los Angeles and San Diego, the realty boards have no Negro members whatsoever. This is particularly disturbing when it is known that such boards represent the top professional association of real estate brokers and that under State law, their members alone are entitled to use the coveted term 'realtor' in business advertising." U. S. Commission on Civil Rights, *50 States Report*, p. 44 (1961).

In the Palo Alto area, the United States Civil Rights Commission learned that only three of the 600 real estate brokers and salesmen showed property on a non-discriminatory basis.[13]

In addition to the actions of state licensed real estate brokers and the state responsibility in enforcing restrictive covenants prior to the *Shelley* decision, the state, as well as the federal government, had contributed to the existence of segregated patterns by pouring public funds

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[12] See Cal. Hearings, pp. 257, 483 *et. seq.*

[13] U. S. Commission on Civil Rights Report No. 4, Housing, p. 123 (1961).

into housing projects which openly discriminated against non-white citizens. The San Francisco Housing Authority had adopted a policy in 1942, which, until it was enjoined from continuing its discriminatory practices pursuant to court order obtained in *Banks* v. *Housing Authority*, 120 Cal. App. 2d 1, 260 P. 2d 668, cert. denied 347 U. S. 974 (1954), provided that:

> "In the selection of tenants for the projects of this Authority, this Authority shall act with reference to the established usages, customs and traditions of the community * * * and *shall not insofar as possible enforce the commingling of races* * * *." (Emphasis added) 260 P. 2d at 671.

With respect to assistance furnished by the Federal Housing Authority, an FHA official stated that of the 125,000 FHA assisted housing units built from 1950 to 1954 in the Los Angeles area, only 3,000 units were available for purchase by non-whites.[14]

In addition to the actions already described, the State of California has in the past specifically barred certain minorities from acquiring particular interests in real property. Thus, in 1879, California adopted a constitutional provision authorizing the delegation of power to localities to zone Chinese into particular areas, or to remove them completely from the limits of cities and towns. California Constitution, Article XIX (1879). This constitutional provision was not repealed until 1952. The California Legislature also enacted an Alien Land Law in 1920 (Cal. 1 General Laws, Acts 260-261) which prevented aliens who were ineligible for citizenship from acquiring interests in real property. It was repealed in 1950.

It should be pointed out that the above is not intended to single California out by way of condemnation for the existence of segregated housing patterns. This same criti-

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[14] Cal. Hearings, p. 258.

cism could probably be leveled at most states in this union. Nor has California shirked its responsibility in seeking to correct this situation as shown by the passage of their Legislature in recent years of the Unruh, Hawkins and Rumford Acts, *supra*. But the responsibility to eliminate the evils of housing discrimination is a continuing one and cannot be ignored as the proponents of Proposition 14 have contended by repealing fair housing ordinances and restoring the State to a position of neutrality—for which there is no historical basis.

3. *The myth of state "neutrality".*

In view of the above factors which have created segregated housing patterns throughout California, it is absurd to contend that the repeal of existing fair housing laws and ordinances in California and the creation of a right to discriminate with impunity in the sale or rental of residential housing will involve an act of neutrality by the state. If non-white citizens in California were unable, as has been shown, to obtain housing accommodations except in urban ghettos prior to the recent enactment of state anti-discrimination statutes, the repeal of these laws and the creation of an absolute right to discriminate means the restoration of the same barriers these citizens have previously faced in seeking decent shelter.

The effect of Article I, § 26, will be to prevent the California Legislature from taking any future action to break down segregated housing patterns and to relieve the attendant evils that arise in urban ghettos. It would not only bar the Legislature from seeking to ameliorate the problems faced by members of minorities in acquiring decent housing, but would prevent the California courts from any extension of common-law policies in this area. In this regard, it should be noted that the Superior Court in Sacramento County, in the case of *Ming* v. *Horgan* (No. 97130), June 23, 1958, 3 Race Rel. L. Rep. 693), held that a Negro could not be excluded from purchasing a new

tract home in a subdivision in the Sacramento area which had obtained FHA and VA insurance solely because of his race—despite the absence of any statutory provision at that time barring racial discrimination in the sale of housing. The Court stated at page 12 of its memorandum opinion:

> "* * * can the courts close their eyes to the inevitable result that if they should uphold defendants in their asserted right of freedom of contract, they would for practical purposes be reverting to a 'separate but equal' rule for those for whom the builders and realtors choose to apply it? * * * If the courts were to * * * accord to builders and realtors the unfettered freedom of contract here contended for, the constitutional guarantees of equal protection and nondiscrimination would be accorded only secondary importance and they would have to recede from a good deal that has been laid down in recent years as fundamental doctrine * * *"

If the right to discriminate which Article I, § 26 purports to provide is held constitutional under Fourteenth Amendment requirements, the issuance of such decisions, as in the *Ming* case, *supra*, would be proscribed in the future.

In sum, the operation of Article I, § 26 can only serve to perpetuate the present patterns of segregated housing and encourage the development of similar patterns in the future. Even if the State or its subdivisions had not been indirectly responsible for housing segregation in the past, it may not by constitutional amendment seek to perpetuate the existence of segregated housing areas. *Cf. Burton* v. *Wilmington Parking Authority*, 365 U. S. 715, 725 (1961); *Taylor* v. *Board of Education of City School District of New Rochelle*, 294 F. 2d 36 (2nd Cir., 1961), cert. denied 368 U. S. 940. Nor may the State encourage, or furnish the vehicle, by which racial prejudice may operate against

any group, whether by express statutory prohibition or by indirection. *Anderson* v. *Martin,* 375 U. S. 399, 402-404 (1964); *Terry* v. *Adams,* 345 U. S. 461 (1953).

Nearly a century ago, this Court, in speaking of the purposes of the Fourteenth Amendment, stated in *Strauder* v. *West Virginia,* 100 U. S. 303, 307-308 (1879):

> "* * * The words of the [fourteenth] amendment, it is true, are prohibitory, but they contain a necessary implication of a positive immunity, or right, most valuable to the colored race,—*the right to exemption from unfriendly legislation* against them distinctively as colored,—exemption from legal discriminations, implying inferiority in civil society, lessening the security of their enjoyment of the rights which others enjoy, and discriminations which are steps towards redueing them to the condition of a subject race." (Emphasis supplied)

Article I, § 26 is, in purpose and effect, an example of the type of "unfriendly legislation" that the Fourteenth Amendment was intended to proscribe.

B. The scope of the right to discriminate conferred by Article I, § 26 would involve state action.

There can be no question that discriminatory State action abridging the right of any person to acquire, enjoy, own and dispose of property is in violation of the Fourteenth Amendment. *Shelley* v. *Kraemer,* 334 U. S. 1, 10 (1948); *Oyama* v. *California,* 332 U. S. 633 (1948); *Buchanan* v. *Warley,* 245 U. S. 60 (1917). Since it is impossible to fashion and apply a precise formula for recognition of State responsibility under the Equal Protection Clause, this Court has stated:

> "Only by sifting facts and weighing circumstances can the non obvious involvement of the State in pri-

vate conduct be attributed its true significance." *Burton* v. *Wilmington Parking Authority*, 365 U. S. 715, 722 (1961).

The full scope of the right to discriminate conferred by the California amendment at issue cannot help but involve State action in a significant manner.

Although the language in the "Argument in favor of Proposition 14" on the official ballot (Petitioners' Brief, App. 3-5) is subtly phrased to imply that it is only the individual homeowner whom the amendment is designed to protect, it is clear from a reading of the proposition itself that it is the large apartment house corporations and realty developers and real estate agents, who will share in the right to discriminate. Thus, the term "person," who in the amendment is given the right to decline to sell, lease or rent any interest in real property with "absolute discretion," is defined to include "individuals, partnerships, corporations, and other legal entities and their agents or representatives," excluding only the State or any subdivision thereof with respect to property owned by it. The term "real property" is defined to include "any interest in real property of any kind or quality, present or future, irrespective of how obtained or financed, which is used, designed, constructed, zoned or otherwise devoted to or limited for residential purposes * * *." Only property acquired by eminent domain, and public places engaged in furnishing lodging, are excluded from the section's application.

The scope of Article I, § 26 is, therefore, broad enough to confer a right of racial discrimination on any privately owned residential development, regardless of its size or the amount of state and federal financial support it has received. In *Peyton* v. *Barrington Plaza Corporation*, 50 Cal. Rptr. 905, 413 P. 2d 849 (Sup. Ct., Cal., 1966), this very right to engage in racial discrimination upon the

authority of Article I, § 26 was asserted by Barrington Plaza, in the City of Los Angeles. Barrington Plaza, the largest apartment development in the western United States, provides apartment living for 2,500 people and includes many retail shops and professional services. The development was part of the urban development program undertaken by the City of Los Angeles, with 90% of its construction costs financed by a $17,000,000 low interest rate loan under the National Housing Act. Defendants' assertion of Article I, § 26 as a defense to a claim for damages by a Negro physician who was refused an apartment in Barrington Plaza was sustained by the Superior Court, but the judgment was reversed by the California Supreme Court on the authority of *Mulkey* v. *Reitman*, 50 Cal. Rptr. 881, 413 P. 2d 825 (1966).

Even in the absence of the *Mulkey* decision, *supra*, there can be no doubt that the creation of a right by Article I, § 26 to engage in racial discrimination, when practiced by a private development such as Barrington Plaza, must be held to contravene the prohibitions of the Fourteenth Amendment. See, e.g., *Burton* v. *Wilmington Parking Authority, supra; Evans* v. *Newton*, 382 U. S. 296 (1966); *Smith* v. *Holiday Inns of America*, 336 F. 2d 630 (6th Cir., 1964); *City of Greensboro* v. *Simpkins*, 246 F. 2d 425 (4th Cir., 1957). As the facts set forth in the opinion of the California Supreme Court point out, Barrington Plaza not only received substantial government financial assistance, but was aided by the State and local governments in receiving zoning changes to accommodate the development. It also received building permits, sold securities, and established shops and professional services all pursuant to State or local approval, cooperation and authority. In line with the reasoning of the above authorities, all these facets of State involvement should prohibit racially discriminatory conduct.

The type of housing development described in the *Barrington Plaza* case, *supra*, is by no means unique in Cali-

fornia today. Many of these housing projects, in terms of their dimensions and functions alone, should be obliged to conform to the same constitutional restrictions as were imposed on the company town in *Marsh* v. *Alabama,* 326 U. S. 501 (1946).

In practice, there are few residential housing projects that cannot be said to depend upon State support in significant involvements. The issuance of corporate charters, the licensing of real estate brokers, the granting of zoning awards, the recording of deeds, and the construction of roads and sidewalks all involve aspects of State action.

Moreover, State action would be involved in any attempt by the California courts to enforce or recognize the right to discriminate accorded by Article I, § 26. Thus, in *Hill* v. *Miller,* 50 Cal. Rptr. 908, 413 P. 2d 852 (1966), an action to restrain a landlord from evicting a Negro tenant, solely because of his race, was dismissed by the Trial Court by virtue of Article I, § 26, prior to being reversed by the California Supreme Court upon the authority of *Mulkey* v. *Reitman, supra.* See also *Prendergast* v. *Snyder,* 50 Cal. Rptr. 903, 413 P. 2d 847 (1966). Here, again, even in the absence of the *Mulkey* decision, the enforcement or sanctioning by the State judiciary of conduct based on racial discrimination would be violative of the Fourteenth Amendment. See *Shelley* v. *Kraemer, supra; Barrows* v. *Jackson,* 346 U. S. 249 (1953).

To attempt to carve out an exception to the "State action" concept by declaring that the right conferred by § 26 shall apply to any interest "irrespective of how obtained or financed" is a meaningless gesture. Clearly, a State constitution may not bind this Court in defining the area in which discriminatory conduct may flourish with impunity. While there may be residential properties in which the extent of State involvement is minimal, the application of § 26 is in no manner confined to that area.

The highest court in California, with the primary responsibility of preserving, where possible, the constitutional

portions of State enactments, found it impossible to differentiate between those portions or applications of the Amendment which might preserve a "proper basis for discrimination" consistent with Fourteenth Amendment requirements (R. 29-31). The language and object of the Amendment leaves no opportunity for severability unless the definition of the right to discriminate sought to be accorded is rewritten by this Court. The entire Amendment must, accordingly, be held invalid as a violation of the Fourteenth Amendment.

POINT II

Article I, § 26 of the California Constitution abridges the privileges of citizens of the United States to reside and acquire interests in real property within the State of California.

Section 1 of the Fourteenth Amendment provides:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States * * *"

The exact nature of the privileges and immunities which are derived from *national* citizenship has been a subject of dispute since the issuance of the opinion of Mr. Justice Miller in the *Slaughter-House cases*, 16 Wall. 36 (1873).[15] However, it is well established that the right to move freely from state to state is an incident of national citizenship

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[15] Prior to the adoption of the Fourteenth Amendment, the privileges and immunities of citizens in the several States were said to include "the enjoyment of life and liberty with the right to acquire and possess property of every kind." *Corfield* v. *Coryell*, 4 Wash. C. C. 371 (1825).

protected by the privileges and immunities clause of the Fourteenth Amendment against state interference. *Crandall* v. *Nevada,* 6 Wall. 35 (1868); *Twining* v. *New Jersey,* 211 U. S. 78, 97 (1908); *Truax* v. *Raich,* 239 U. S. 33, 39 (1915); *United States* v. *Guest,* 383 U. S. 745, 757-759 (1966).

In *Edwards* v. *California,* 314 U. S. 160 (1941), where this Court invalidated a California statute designed to keep indigents from migrating to California, the right of American citizens to enter into and abide in any state served as the basis for the concurring opinion of Mr. Justice Douglas, joined by Justices Black and Murphy. Justice Douglas observed that to permit states to bar indigents from residing within their borders would allow:

> "* * * such an exception to be engrafted on the rights of *national* citizenship * * * [as] to contravene every conception of national unity * * * It would prevent a citizen because he was poor from seeking new horizons in other States. It might thus withhold from large segments of our people that mobility which is basic to any guarantee of freedom of opportunity." (p. 181)

A state is not only prohibited from directly interfering with the national right to enter its borders, as in *Edwards* v. *California, supra,* but may not seek to circumvent this right by imposing barriers preventing non-residents from obtaining employment. Thus, in *Truax* v. *Raich,* 239 U. S. 33 (1915), this Court sustained the contentions of a non-resident alien that an Arizona law, which required all Arizona employers of more than five workers to hire not less than 80% qualified or native born citizens of the United States, was invalid. The Court declared that Raich, having been lawfully admitted into the country under Federal law, had a Federal privilege to enter and abide in "any state in the union," and that this privilege to enter and abide in any state carried with it the "right to

work for a living in the common occupations of the community." The Court went on to state that:

> "The assertion of an authority to deny to aliens the opportunity of earning a livelihood when lawfully admitted to the State would be tantamount to the assertion of the right to deny them entrance and abode, for in ordinary cases they cannot live where they cannot work. And, if such a policy were permissible, the practical result would be that those lawfully admitted to the country * * * instead of enjoying in a substantial sense and in their full scope the privileges conferred by admission, would be segregated in such of the States as chose to offer hospitality." (p. 42)

Similarly, in *Takahashi* v. *Fish & Game Commission*, 334 U. S. 410 (1948), this Court followed the principles stated in *Truax* v. *Raich, supra,* to invalidate a California law barring the issuance of commercial fish licenses to any person ineligible for citizenship. See also *Colorado Anti-Discrimination Commission* v. *Continental Air Lines*, 372 U. S. 714, 721 (1963).

If a state may not interfere with the national privilege of citizens (as well as aliens) to enter and abide in any state in the union by limiting their right to secure employment, it should necessarily follow that a state may not constitutionally limit their right to secure housing within its borders by laws which sanction, if not encourage, racial and religious discrimination in the sale and rental of housing accommodations.

The enactment of the *Unruh, Hawkins* and *Rumford* Acts by the California Legislature were based upon the recognition of the immense difficulties that have been encountered by members of minority races in obtaining adequate housing in California. The repeal of fair housing legislation and the creation by Article I, § 26 of a "right" to engage in racial or religious discrimination in housing transactions, will necessarily discourage non-whites from

moving to California, will limit the housing opportunities available to non-whites now residing in California, and will tend to confine them to other states and within segregated locales in California itself.

In his concurring opinion in *Bell* v. *Maryland*, 378 U. S. 226, 242 (1964), Mr. Justice Douglas, in declaring that segregation in private restaurants was a "denial of a privilege and immunity of national citizenship", stated (p. 255):

> "Is the right of a person to eat less basic than his right to travel, which we protected in *Edwards* v. *California*, 314 U. S. 160? Does not a right to travel in modern times sink in value materially when there is no accompanying right to eat in public places?"

To the above, we might add: Is not the right to enter into and abide in any state rendered meaningless without a right to obtain housing free from racial discriminatory practices that have been sanctioned by state law?

POINT III

Article I, § 26 is violative of federal rights set forth in § 1982 of Title 42 of the United States Code.

42 U.S.C. § 1982 provides:

> "All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property."

The above provision first appeared in § 1 of the Civil Rights Act of 1866 (Ch. 31, § 1, 14 Stat. 27) enacted several months after the adoption of the Thirteenth Amendment. On May 31, 1870, after the ratification of the Fourteenth Amendment, the above section was reenacted as part of § 18 of the Second Civil Rights Act (Ch. 114, 16

Stat. 140) and was recast in its present form in the general statutory provision of 1875 as § 1978 of the Revised Statutes.

Section 1982 was relied on by this Court in *Oyama* v. *California*, 332 U. S. 633 (1948), in holding that the California Alien Land Law, as applied to bar the citizen son of a Japanese alien from inheriting an interest in agricultural land, deprived the son of the equal protection of the laws and of his privileges as an American citizen. Referring to § 1982, the Court noted that (p. 640):

> "By federal statute, enacted before the Fourteenth Amendment but vindicated by it, the states must accord to all citizens the right to take and hold real property."

The Court concluded (p. 647):

> "• • • this case presents a conflict between the State's right to formulate a policy of landholding within its bounds and the right of an American citizen to own land anywhere in the United States. When these two rights clash, the rights of a citizen may not be subordinated merely because of his father's country of origin."

A state law may be violative of the rights afforded by § 1982, despite the absence of any express language referring to any race or creed, if the practical consequences of such law limits the opportunities of any class of citizens to acquire property interests. This was true of the statute in question in *Oyama, supra,* as was recognized by Mr. Justice Murphy in his concurring opinion in which he observed:

> "In its argument before us California has disclaimed any implication that the Alien Land Law is racist in its origin, purpose or effect. Reference is made to the

> fact that nowhere in the statute is there a single mention of race, color, creed • • • However, an examination of the circumstances surrounding the original enactment • • • and its subsequent application reveals quite a different story." 322 U. S. at 650-651.

Similary, although Article I, § 26 of the California Constitution does not specifically refer to any race or creed, its practical consequences will be to subject the non-white citizens of California to the prejudices of the white majority in acquiring or retaining interests in real property without recourse to any state agency or the courts.

It is obvious that the rights provided by § 1982 may not be abridged by any state statute. However, it must also be remembered that § 1982 was originally enacted pursuant to the authority of Congress to enforce the Thirteenth Amendment. The objectives of Congress in enacting that section were described by this Court in the *Civil Rights Cases*, 109 U. S. 3, 22 (1883), in the following terms:

> "'Congress, • • • by the Civil Rights Bill of 1866, passed in view of the Thirteenth Amendment, before the Fourteenth was adopted, undertook to wipe out these burdens and disabilities, the necessary incidents of slavery, constituting its substance and visible form; and to secure to all citizens of every race and color, and without regard to previous servitude, those fundamental rights which are the essence of civil freedom, namely, the same right to make and enforce contracts, to sue, be parties, give evidence, and to inherit, purchase, lease, sell and convey property, as is enjoyed by white citizens."

Since § 1982 rests upon the authority of the Thirteenth (as well as the Fourteenth) Amendment, its coverage extends to any discriminatory acts which abridge the rights set forth therein regardless of any showing of state ac-

tion. As observed by the court in the *Civil Rights Cases, supra*, at p. 23:

> "Under the Thirteenth Amendment, the legislation, so far as necessary or proper to eradicate all forms and incidents of slavery and involuntary servitude, may be direct and primary, operating upon the acts of individuals, whether sanctioned by state legislation or not • • •"

See also *Clyatt* v. *United States*, 197 U. S. 207 (1905); *United States* v. *Shackney*, 333 F. 2d 475, 486 (2d Cir., 1964).

It should be evident from the above that any agreement or action taken by private sellers or lessors of real property to prevent Negroes from acquiring or leasing property would be violative of the rights set forth in § 1982. Insofar as Article I, § 26 of the California Constitution attempts to cloak individuals and corporations with immunity in discriminating against non-white citizens in the sale or rental of real property, it is an abridgement of the rights provided by § 1982 and, under the Federal Supremacy Clause, cannot be sustained. *Cf. Katzenbach* v. *Morgan*, 384 U. S. 641 (1966).

CONCLUSION

For the foregoing reasons, the decision of the Court below that Article I, § 26 of the California Constitution is in violation of the Fourteenth Amendment of the United States Constitution should be affirmed.

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Respectfully submitted,

LOUIS J. LEFKOWITZ
Attorney General of the State of New York

SAMUEL A. HIRSHOWITZ
First Assistant Attorney General

GEORGE D. ZUCKERMAN
LAWRENCE J. GROSS
Assistant Attorneys General
Of Counsel